Supreme Court

OF THE

United States

United States Fidelity and Guaranty Company,
Appellant,
vs.
A. Sandoval and P. Sandoval,
Appellees.

No. 125

APPELLANT'S BRIEF.

STATEMENT.

The action, in which the judgment appealed from was entered, was brought by the United States Fidelity and Guaranty Company, appellant, upon a contract with defendants appellees, whereby it became surety upon a supersedeas bond given by them upon an appeal to the Supreme Court of Arizona from a judgment against them in favor of one Epes Randolph for the sum of $10,528.33.

The Supreme Court rendered judgment of af-

firmance, and in pursuance of the Arizona statute adjudged that Randolph recover from the defendants and this appellant as surety upon such appeal bond the amount of the judgment appealed from with interest and costs.

A motion for a rehearing was filed in said Supreme Court and denied on the 19th day of May, 1908. An appeal to the United States Supreme Court from such judgment was subsequently taken, and is now pending; on the 24th day of June, 1908, however, no such appeal, writ of error or supersedeas had been perfected.

It is alleged in the complaint that "said defendants (appellees) on the 24th day of June, 1908, had wholly failed to pay the said judgment or to appeal therefrom to the Supreme Court of the United States" [fol. 7]; this allegation is not denied in the answer.

On the 19th day of June, 1908, the governor of the territory of Arizona, at the instance of Randolph, caused the following telegram to be sent to the appellant:

"Phoenix, Arizona, June 19th, 1908.

The U. S. F. & G. Co., Baltimore, Md. Informal complaint has been lodged with me that Epes Randolph obtained judgment in Supreme Court of the territory against you on appeal bond in case of Randolph v. Sandoval on twenty-seventh March last for ten thousand and some odd dollars and costs. That demand has been made on you for payment. That there has been no stay of judgment or steps to appeal from it. That you

ignore his demands. Do you care to advise me of the reason?

JOSEPH H. KIBBEY,
Governor of Arizona. 3:30 p. m."

On said 24th day of June, 1908, the appellant paid to Randolph in satisfaction of said judgment and interest the sum of $11,484.95.

It is alleged in the complaint, and admitted in the answer, that prior to the giving of the supersedeas bond by appellant the appellees entered into a written application for such bond and agreement with the appellant, which is set forth in full at pages 2 and 3 of the transcript of record, and that the supersedeas bond was given in pursuance of such agreement.

In and by such application and agreement, the appellees contracted "to reimburse said company (appellant) for any and all loss, costs, charges, suits, damages, counsel fees and expenses of whatever kind or nature which said company shall or may for any cause at any time sustain or incur, or have to pay to any person, or in consequence of said company having entered into or executed such bond."

It is alleged in the complaint that appellant's expenses in consequence of having executed said bond prior to the commencement of the action, amounted to $776.75.

The complaint then further alleges as follows:

"That this plaintiff has demanded of the said defendants that they reimburse this plaintiff in

the said several sums paid out as aforesaid, and that the defendants have refused to reimburse the plaintiff in said sum or any part thereof.

"That in order to collect the said sums from the said defendants, it has become necessary for this plaintiff to employ counsel to bring and institute this action, and this plaintiff has agreed to pay said counsel reasonable fee and charges for the institution and prosecution of this suit, and as plaintiff is informed and believes, the reasonable cost of the institution and prosecution of this suit will be the sum of $3,000, be the same more or less." [Fol. 8.]

The answer, after several admissions and denials, alleges that the facts were:

"That after the judgment was affirmed in the Supreme Court of the territory of Arizona, and a motion for rehearing of said cause was denied, a notice of appeal was duly given to the Supreme Court of the United States; that a stay bond for said appeal was duly made and entered into; that said cause was thereafter transferred to the Supreme Court of the United States, and is now pending in said court." [Fol. 12.]

It will be noted that there is no averment as to how long after the affirmance of the judgment such notice of appeal was given to the Supreme Court of the United States, and, therefore, upon the pleadings as they stand, the allegation in the complaint that the appellees had on the "24th day of June, 1908, wholly failed to pay the said judgment or to appeal therefrom to the Supreme Court of the United States" remains uncontradicted.

It appears from the statement of facts found by the Supreme Court of Arizona, that

"On the 24th day of June, 1908, and prior to the payment of said $11,484.95, one James H. Borland, representative of the appellee (appellant here), being then in the city of San Francisco, had a telephonic talk with one Catesby Thom, also a representative of the said appellee (appellant here), and one Eugene S. Ives, attorney for the said Randolph (both the said Thom and the said Ives being then in the city of Los Angeles), with respect to the making of said payment; then after said telephonic conversation, and in pursuance of the directions of the said Borland, the said Thom, in behalf of the said appellee (appellant here), made the said payment as aforesaid; that thereafter, the said Borland claimed that it had been agreed between the said Randolph and the appellee (appellant here) that the said Randolph would refund the money to the appellee (appellant here) if under any proceeding that might be instituted in the case of Epes Randolph against A. and P. Sandoval it should appear that it was not proper for the appellee (appellant here) to have paid the money; that the said Ives on the other hand claimed that the gist and substance of said telephonic conversation was that inasmuch as a supersedeas bond might have been filed with the clerk of the Supreme Court in the city of Phoenix, Arizona, at the very time the said payment was being made, the said Ives, in behalf of the said Randolph, agreed that, the said payment being

made at precisely three o'clock, in the event that it should transpire thereafter that such a supersedeas bond had been filed prior to said hour, then the said Randolph would return the said sum to appellee (appellant here).

That thereafter, on the 23rd day of July, 1908, the said Borland, Randolph and Ives met in the city of Los Angeles, and that at said meeting their respective contentions as aforesaid were presented and discussed, and the said Randolph, by way of adjustment thereof, and in satisfaction of the agreement made over the telephone as aforesaid, whatever said agreement may have been and as a part of the transaction and arrangement under which payment was made by the appellee (appellant here) to the said Randolph, did give to the appellee (appellant here) a bond and collateral security in the words and figures following, to-wit:

By the terms of the bond Randolph obligated himself to refund to the appellant the money paid him in the event that the United States Supreme Court should reverse the judgment in his favor against the Sandovals, and gave the appellant as collateral security for such obligation 25,000 shares of the capital stock of the Huntington Beach Company.

Neither the giving of this bond nor its attending circumstances were pleaded.

The cause was tried by the court without a jury

and resulted in a judgment in favor of the plaintiff for $14,683.25. The items appear in the findings of the district court, at page 9 of the transcript.

From this judgment the defendants, appellees here, appealed to the Supreme Court of Arizona, and presented several assignments of error. These are discussed seriatim in the opinion of the Supreme Court, and were all resolved in favor of the plaintiff appellant save one. That court held that the giving of the bond by Randolph to appellant made the payment by appellant a conditional one, and that for that reason the trial court erred in giving judgment for the amount paid to Randolph. It held, however, that the plaintiff was entitled to recover "such amounts as it reasonably expended in connection with the adjustment of the matter," which aggregated $544.50. It accordingly modified the judgment by reducing it to such amount, and affirmed it as so modified, but without prejudice to the rights of the plaintiff "to bring such further action as may be necessary to establish its rights, should a right to reimbursement of the amount of the judgment accrue to it."

Appellant filed a motion for a rehearing, which was denied, and thereupon appealed to this court. The motion for a rehearing appears at pages 97 and 98 of the transcript.

Assignment of Errors.

The appellant assigns the following errors committed by the Supreme Court of Arizona.

I.

The Supreme Court erred in modifying the judgment of the district court in favor of plaintiff-appellant, for the reason that the receipt of collateral security by the plaintiff-appellant from Randolph to indemnify it is no defense to the action brought by it against the defendants-appellees under the contract of indemnity between appellant and appellees.

II.

The Supreme Court erred in modifying said judgment, for the reason that the payment by appellant to Randolph on the 24th day of June, 1908, of the amount of the judgment rendered against the appellant and the appellees in the suit brought by Randolph was an absolute payment, and was in no sense a condition of the payment, it appearing from the evidence that the bond given from Randolph to the Sandovals (*sic*, should be appellant) was given long after such payment and after the cause of action set forth in the complaint had accrued, and that such bond was given by Randolph not in pursuance of any agreement or understanding had or made at the time of the payment to him.

III.

The court erred in so modifying the said judgment, for the reason that the payment to Randolph was an absolute payment and the bond given by Randolph to the appellant was nothing more than a written obligation on the part of Randolph to perform what was already his legal duty, without respect to such bond, and the receiving of collateral security, from Randolph, that he would fulfill such pre-existing obligation, did not alter or effect the nature of the obligation nor the absolute character of the payment by appellee to Randolph.

IV.

The Supreme Court erred in modifying said judgment for the reason that the obtaining of such collateral security from Randolph was an act for the benefit of both appellant and appellee, and did not relieve appellees from their duty to pay to appellant the amount which they had paid out to Randolph, and upon the repayment by appellant of such amount the appellees would have been subrogated to the rights of appellant in such collateral security.

V.

The Supreme Court erred in modifying the said judgment for the reason that under the facts found appellant is entitled as a matter of law to the judgment rendered by the district court.

ARGUMENT.

I.

The taking of Randolph's bond and collateral did not deprive appellant of its right to recover from appellees the amount paid Randolph.

The Supreme Court holds that the payment to Randolph was not premature [fols. 191-2]. It was therefore not only the right but the duty of appellant to make such payment. It follows necessarily that upon such payment a cause of action accrued in its favor against the appellees for the amount so paid. The payment having been made on June 24th and the bond not having been given by Randolph until the 23d of July, it would seem to follow that such cause of action existed continuously from June 24th to July 23rd. If this be admitted, then in order to sustain the reversal it must be assumed that upon that date such cause of action terminated, but appellees cannot make such admission; for to do so raises at the very threshold of their argument the fatal objection that the facts claimed to have the effect of terminating this existing cause of action are new matter constituting a defense and could not be availed of unless pleaded.

Piercy v. Sabin, 10 Cal. 22.

Therefore the appellees and the Supreme Court in its opinion contend that no cause of action at any time accrues in appellant's favor, and under-

take to meet the objection that the bond was not given until nearly a month after the payment by arguing that nevertheless the giving of the bond and the payment were parts of the same transaction.

It is true that the Supreme Court finds as a fact that Randolph gave the bond "as a part of the transaction and arrangement under which payment was made." We are familiar with the established rule that this court will not inquire into the correctness of the facts found by the Supreme Court. But such rule will not restrain this court from interpreting such facts in the light of other facts found and of the evidence, if there be no conflict.

The only evidence upon the matter of the bond given by Randolph consists of the testimony of Borland and Ives.

Omitting the portions of his answer stricken out by the court, Borland testified as follows:

"Upon receipt of telegrams from the home office of my company, my associate, Mr. H. D. V. Johns, I took up the matter with the company's representative at Los Angeles California, and Nogales, Arizona. Upon receipt of a further telegram from the home office, and also receiving information from Mr. Frank M. Kelsey at Los Angeles, California, I instructed Mr. Kelsey by telephone on June 24th, 1908, to inform Mr. Epes Randolph that if A. and P. Sandoval did not settle the judgment by three o'clock of that afternoon, I would authorize him to draw upon this office for the full amount of the judgment. At 3:30 Mr.

Catesby Thom telephoned me from Los Angeles, California, advising that the judgment had not been settled. I therefore authorized him to pay the amount to Mr. Epes Randolph and draw on the United States Fidelity and Guaranty Company for the full amount. In accordance with my instructions, draft was drawn and paid." [Fol. 128.]

"Upon further instructions from the home office, and owing to the amount involved, I followed up my instructions as previously stated, and proceeded to Los Angeles, California, on July 21st, 1908. On the following day, July 22, I met Mr. Epes Randolph and Mr. Frank M. Kelsey, at which time I discussed with Mr. Randolph the form of agreement that he should give our company, setting forth the understanding that if under any proceedings that might be instituted in the case of Epes Randolph v. A. and P. Sandoval, it should appear that we had paid the judgment prematurely, that Mr. Randolph would refund the money to our company. At this meeting he asked that I allow the matter to go over until the following day, when he would have his attorney, Mr. Eugene S. Ives, present. On the afternoon of July 23rd, 1908, I met Mr. Randolph and Mr. Ives, and Mr. Kelsey was also present, and at this meeting Mr. Randolph agreed to give our company a bond guaranteeing the return of the money to us in case the judgment should not be affirmed." [Fol. 129.]

Ives testified:

"A. The conversation that occurred was this, Mr. Morrison: Mr. Thom talked with Mr. Borland; I insisted in my talk with Mr. Thom and Mr. Kelsey that this money should be paid, and told him that I would insist that the governor revoke the license if the money was not paid, and

Mr. Thom then at about one o'clock stated to me, he was talking over the 'phone at the time to Mr. Borland, that Mr. Borland wanted to pay it, but that for all they knew the supersedeas bond might be (deemed) filed by Sandoval and Company in Phoenix at that very minute, and thereupon I stated that that expense *(sic)* might be met at any time, and thereupon Mr. Thom again talked to Mr. Borland, repeated what I had said, and Mr. Thom then again said that Mr. Borland said that if the word did not come that the bond had been filed before three o'clock, precisely at three o'clock they would pay me the amount of the judgment, provided I would secure them if it should thereafter transpire that prior to three o'clock, and I assured them that should it afterwards transpire that the supersedeas bond had been filed prior to that date, that I would return the money, and also that I would return it if it was not proper that they should have paid it. Now, exactly as to what transpired between Thom and Borland on that point I don't know. The money was paid, and it transpired that the bond had not been filed at that time. Now, if you want me to state what occurred afterwards between Mr. Borland and myself, I will.

Q. Yes.

A. After that I went to Los Angeles, it was about the 15th of July, maybe the 25th, I can find the precise date in a little while, but in any event Mr. Borland, Mr. Randolph and Mr. Kelsey were present, and Mr. Borland stated that we had agreed, as he understood it, with Mr. Thom, that if it was not proper for them to have made the payment I would return it, and wanted to know what we would do under the circumstances, and I resisted that and said that the only agreement was that if the bond should turn out to have been filed before three o'clock, that we would return it, and then there was an issue about it, and I said to

Mr. Borland that in case the judgment should be reversed by the Supreme Court of the United States (it was stated in the conversation that the Sandovals had appealed to the Supreme Court of the United States) that Randolph would have no objection whatever to giving them a bond to that effect." [Fols. 98-9.]

At the conference on the 23d of July, 1908, at which Borland was present and Randolph agreed to give the bond in evidence, Randolph need not have given any. Borland did not claim that Randolph was obligated to give the bond which was given. Randolph did not deem that he was obligated to give any bond at all. The transaction at the time of the payment had been conducted over the telephone between Borland in San Francisco and his representative Thom in Los Angeles.

As a result of it, Mr. Thom paid the money. Mr. Thom made no statement to Ives that the surety company would expect Randolph to refund the money, except in the event that it should appear that a supersedeas bond had been filed before the actual time of payment. Borland, however, unquestionably in good faith, contended that his understanding of his communication (not to Ives but to Thom) was that if it should appear that the Surety Company had paid the judgment prematurely, Randolph should refund the money. In order to adjust this difference, and not in pursuance of any obligation, Randolph agreed to do

what? ONLY THAT WHICH IT WAS HIS LEGAL DUTY TO DO ANYHOW.

"Where money has been paid upon an erroneous judgment which after the payment has been reversed the party paying may maintain an action to recover it back. It is not necessary to the right of action that payment should have been coerced by execution."

Schaley v. Halsey, 72 N. Y. 578;

Bank of U. S. v. Bank of Washington, 6 Peters 8;

Haebler v. Myers, 132 N. Y. 363, 30 N. E. 963.

We believe that this is the unquestioned rule.

The written obligation given by Randolph, therefore, expressed nothing more than the obligation implied in law in any event. Converting it from an implied to an express contract did not change its character. The rights of the parties to the payment remained precisely as if they had been content to rest upon the implied agreement. Randolph agreed in writing to do exactly what the law would have compelled him to do with the writing. The written obligation did not add even a "jot or tittle" to the obligation he would have been under without any writing.

To repeat, then, Randolph declined to acknowledge Borland's contention that he was under any obligation to return thre money in case it should transpire that the surety company had paid the same prematurely; but as found in the statement

of facts Randolph after "their respective contentions were presented and discussed * * * by way of adjustment and in satisfaction of the agreement made over the telephone, whatever that agreement may have been," avowed his willingness to put in writing what was already his then existing legal obligation; and to give collateral security for its performance.

While, therefore, the bond was in a sense a part of the transaction between Randolph and the Surety Company, nevertheless, and notwithstanding the language employed in the bond itself, it was not a part of such transaction in the sense of being a condition of the payment. The payment was made unattended by any condition other than the understanding between Borland and Ives at the telephonic talk on the day of the payment; and such condition did not depend upon any future happening, but upon the ascertainment of a then existing situation.

Borland and Ives each had his own version of said understanding. Neither understood that Randolph was to give any bond or any collateral; therefore, whatever may have been their understanding as to the condition of the payment, the bond and collateral was not such condition.

Ives understood that Randolph was not to refund the money unless it should transpire that a supersedeas bond had been filed at Phoenix prior to the time of the payment made in Los Angeles.

Borland understood that Randolph was to refund the money, if it should appear that the payment had been prematurely made.

Whether it had been prematurely made involved a question of law. Ives recognized that Randolph was obligated to refund, without respect to the telephonic understanding, in the event that the United States Supreme Court should reverse the judgment; so Borland and Ives made a new agreement whereby they substituted for the telephonic understanding the giving of the bond and collateral.

There was no compromise between the Surety Company and Randolph (as suggested in appellees' brief on the motion for a rehearing) of Randolph's judgment against the Surety Company—there was, if the use of the word "compromise" be deemed desirable, a compromise between the Surety Company and Randolph of their difference as to what was the telephonic understanding, and such compromise consisted not in their concluding that the bond and collateral was such understanding, but in their substituting such bond and collateral for the understanding, whatever the same might have been.

It is, therefore, submitted:

First: That there was but one condition of the payment and that such condition was either the "prematureness" of the payment or the fact of a supersedeas bond having been filed prior to it.

The payment not having been premature and the supersedeas not having been filed, the payment was in fact absolute and the cause of action sued upon accrued immediately.

Second: If the subsequent giving of the bond by Randolph had any legal effect whatever upon such cause of action, it should have been pleaded as a special defense.

If it had been so pleaded or the point been raised upon the trial, which the record shows it was not, the Surety Company could have offered to assign the bond and collateral to the appellees, even though, as we shall hereafter contend, such offer was entirely unnecessary.

II.

Even if Randolph had given the bond as security at the time of the payment and as a condition precedent to such payment, and the matter were properly presented by the pleadings, the receipt of such bond and security by appellant would not be a defense to this action.

The principle affirmed in the opinion of this court that a surety is entitled to "nothing more than a reimbursement," and that he shall not "speculate out of the principal," is unquestionably sound law.

The appellant, however, cannot speculate out of the principal in this case. The rule quoted applies to a case where the surety makes his payment either in property other than money, which

is worth less than the amount of the debt, or as in the case of Stone v. Hammel, 83 Cal. 547, 23 Pac. 703, by giving his own note, which is no payment at all.

In this case the surety company paid the amount in money.

It is true that if the judgment should be reversed by the Supreme Court of the United States, Randolph must pay the money back. But suppose the judgment should be affirmed by the Supreme Court of the United States, is it just that the Surety Company, which was not interested in Sandoval's obligation to Randolph, should be compelled to wait for a year or more before it can enforce reimbursement?

Security is not money. Collateral security is not money. An agreement to indemnify is not money. For money paid out by the surety, the surety has an instant cause of action, and this without respect to the fact that it holds indemnity which may protect it against eventual loss. This principle has been settled by the courts.

> "Equality is equity. The moment one co-surety or joint judgment debtor pays the debt of his principal, he has a right to recover from his co-surety or joint judgment debtor his proportionate share. The law gives him this right, and also imposes upon his co-surety the duty of paying his proportionate share. The obligation is as binding upon the co-surety as if created by promissory note or contract. *It would be no defense for a de-*

fendant, when sued upon a promissory note or other written contract, to set up that the plaintiff held collateral securities or property for the purpose of indemnifying himself. Why should it be a defense in this kind of an action. Why should the plaintiff in an action for contribution, after having paid out his money, be compelled to wait until he can realize upon some collateral indemnity, which may require years, while his co-surety, who was as much bound in law and morals as himself, by the bond, has paid nothing? This would not make the burdens of his co-sureties equal. The indemnity is for the benefit of one co-surety as much as for the other, no matter which holds it. Civ. Code Sec. 2849. Either one could apply to the court for its sale, or to enjoin a wrongful disposition of it. The burden of finding a market for it, and applying its value towards the debt of the principal, should be borne by one as well as the other. There is no reason why the co-surety who has paid the debt of his principal should assume the burden of disposing of the indemnity, and the additional burden of waiting until it is disposed of, before he can receive from his co-surety his proportion."

Williams v. Richl, 127 Cal. 365, 59 Pac. at page 764.

To the same effect see:

Paulin v. Kaighn, 29 N. J. 483;

Batchelder v. Fisk, 17 Mass. 464.

III.

The surety company was under no obligation, as suggested in the opinion of this court, to surrender to appellees the securities given to it by Randolph.

Where there are two or more persons sustaining the relation of so-surety, and one of them has received security from the principal for his own indemnity, and the other surety pays the debt, he thereby becomes entitled to all the securities held by the first surety.

Butler v. Birkey, 13th Ohio St. 514.

> "The company did hold a large amount of that stock. Whether it held it as an indemnity for the liabilities it had assumed, we do not care to inquire. Assuming that it did, the fact is quite immaterial. It surely cannot be maintained that a surety who held several securities for his indemnity, cannot use one of them because he has another to which he might resort."
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> Muller v. Dows, 94 U. S. at p. 452.

The taking of collateral security in no way changed the agreement between the parties. The contract or obligation remained the same. Its payment was better secured in the event that it should become necessary to enforce its performance, but that was all. The security added nothing to the agreement. It simply put in the hands of the surety company property out of which it could enforce payment of the obligation, in the

event of the happening of the contingency upon which the obligation would become effective, but it did not affect the obligation itself. The security was a mere deposit, unavailable to the surety company until reversal of the judgment, and then only a mere security, to which it might resort or not as it chose.

When a surety pays the debt for which he becomes surety, he has an immediate right of action against the principal for reimbursement. His cause of action then accrues, and from that time on the statute of limitation commences to run. Though he may have taken security to indemnify him against loss, he may nevertheless maintain an action for reimbursement, unless it has been agreed that he shall look only to the security for his indemnity.

Cornwall v. Gould, 4 Pickering 444.

His rights, in such case, are those of the ordinary creditor who has taken collateral security for his debt; he may reimburse himself from the security, or he may ignore it and sue on the debt. But the giving of collateral security, in itself, never changes his rights, and he may pursue the same remedies as if no security had been given, in the absence of an express agreement to the contrary.

Polhemus v. Prudential Realty Corporation, 74 N. J. L. 570, 67 Atl. 303.

The moment, therefore, that appellant paid Randolph, a cause of action arose in its favor against its principals for the amount paid. The fact that collateral security had been taken from Randolph in no manner impaired this right. It might ignore the security and pursue its recognized remedy against its principals.

The fallacy of the view taken by the Supreme Court of Arizona lies in the assumption that appellant has lost nothing. It has actually lost the amount paid to Randolph. The fact that it may at some future time be paid back this amount does not alter the fact of the present loss. For that loss it is entitled to present reimbursement.

But it is said by the Supreme Court of the territory that "if the judgment in this action is sustained, it will collect the amount from the appellants, and if the Supreme Court of the United States reverses the judgment, the judgment appealed from, it will also be repaid by Randolph." But this ignores the undoubted effect of the collection of the judgment in this case. As in every case, where security has been given for the payment of a debt, and the creditor ignores the security, as he has the right, and collect the debt by ordinary action, the security is released and must be returned to the detbor. It might as well be said that one holding collateral security may not pursue his ordinary action because he may recover a judgment which must be paid and also be paid out of the collateral.

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Payment of the judgment rendered by the court of first instance in this case would at once subrogate the Sandovals to every security held by the surety company for repayment of the amount of the former judgment in case of reversal.

Nelson v. Webster, 72 Neb. 332, 68 L. R. A. 513, and exhaustive note in 68 L. R. A.

And upon payment of the amount which the surety company paid to Randolph the Sandovals would probably be entitled, upon proper showing, to an assignment of the obligation and security which the surety company took from Randolph.

Forms of action are abolished in Arizona, and equitable defenses may be pleaded in legal actions, and the proper course, if the Sandovals desired subrogation, would be to plead the matters entitling them to it, as suggested in

Knoblauch v. Foglesong, 37 Minn. 320, 33 N. W. 865.

There was nothing in the pleadings in this case upon which to base a claim for subrogation, but, ignoring any question of pleading, the utmost effect the taking of security by the surety company would have would be to warrant the granting of relief by way of subrogation, of the kind permitted in Knoblauch v. Foglesong.

The suggestion in the opinion of the Supreme Court of the territory that the surety company

should have surrendered its security in order to maintain this action, is wholly untenable. A surety is not required to surrender his security until he is relieved of liability or reimbursed for liability incurred and paid.

Smith v. Wigler, 72 N. J. Eq. 559, 65 Atl. 900;

27 Am. & Eng. Enc. of Law, 473.

A tender is only necessary where a right is made dependent upon the payment of money or delivery of property.

28 Am. and Eng. Ency. Law (2d Ed.), page 4.

The right of appellees to the securities pledged by Randolph could not accrue until they had actually reimbursed appellant the amount which it had paid to Randolph. Therefore, no tender on the part of appellant was a condition precedent to the right to enforce such payment. Nor was there any necessity for appellant to offer to turn over the securities upon payment by appellees, for the reason that the absolute right of appellees to the benefit of such securities followed as a matter of law automatically from the very fact of payment.

Upon payment appellant immediately became, to the extent of such securities, trustee for appellees.

If it had been alleged as a defense that appel-

lees had offered payment, accompanying the same by a demand for the securities so pledged, and that appellant had refused such offer, such demand and refusal might have been a defense; but it will not be presumed by any court that a trustee lawfully in possession of securities will either misappropriate them or repudiate his trust obligation.

It appears, therefore, that after the appellant surety company had fulfilled its duty and paid Randolph, it had its undoubted right of action against the appellees for reimbursement.

To this the appellees had no defense.

Had the judgment by the Supreme Court of the United States been reversed prior to the giving of any bond by Randolph the appellees if they had reimbursed the surety company would have had, by subrogation, the right to sue Randolph and recover the amount paid to him. Had Randolph been unable to respond to such judgment the appellees would have lost the full amount so paid. This was the condition, and continued to be so, until the 23d day of July, 1908. On that day the surety company, by diligence, obtained from Randolph security that in the event of a reversal he would respond to his already existing legal obligation to repay the money. The situation of appellees became by operation of law improved by this diligence of appellant. They became immediately vested with a right, contingent upon their reimbursing appellant, to be subrogated to its

rights to collect out of the collateral so pledged by Randolph. How, therefore, can it be argued that the surety company by thus acquiring security ultimately for the benefit of the appellees themselves, speculated to their disadvantage, and thereby retarded its own right to reimbursement? It seems to us that this position is both illogical and inequitable. Certainly it is not supported by authority.

IV.

The Demurrer was Properly Overruled.

The appellees filed a general demurrer, and assigned that the court erred in overruling the same, for the reasons:

First: That the facts set forth in the complaint show that the payment of the judgment by appellant was voluntary and negligent.

Second: That there is no allegation in the complaint that the defendants had not paid the judgment in the case of Randolph against Sandoval to the said Randolph at the time that appellant paid the same.

Third: That the complaint fails to allege that the amount sued for was unpaid at the time of the commencement of this action.

We care to make no comment upon the first reason assigned.

The allegation heretofore quoted, which is admitted in the answer, "that said defendants on the

24th day of June, 1908, had wholly failed to pay the said judgment," disposes of the second reason.

The contention that non-payment by the appellees and breach of contract is not properly alleged, is without merit and was not sustained by the authorities cited in appellees' brief in the lower court. They relied upon the case of Scroufe against Clay (71 Cal. 123). This was an action on a promissory note. The complaint averred that the defendant has refused and still refuses to pay "the note or any part thereof."

A special demurrer was interposed to the complaint. Such demurrer was based upon the ground that there was no allegation of non-payment. The court reversed the judgment, overruling the demurrer, stating that "the averments of the complaint are not equivalent to averment of non-payment. The failure to pay constitutes the breach, and must be alleged."

This case was reviewed by the Supreme Court of California in the case of Gardner against Donnelly (86 Cal. 367). At page 373 the court says:

> "It is also claimed that the alleged demand was insufficient, because it was 'for the payment of said judgment, with interest thereon, and costs,' and a portion of the judgment had already been paid. There might be something in this point if the defendants had offered or shown a willingness to pay the amount still due, but, as alleged, they and each of them neglected and refused 'to pay the balance due on said judgment, or any

> portion thereof.' We think the allegation of demand and refusal sufficient, certainly in the absence of a special demurrer.
>
> "Finally, it is urged that the judgment should be reversed, because there was no sufficient averment in the complaint of non-payment; and in support of this position counsel cite Scroufe v. Clay, 71 Cal. 123. In answer to this, it is enough to say that the same point was considered and overruled in O'Hanlon v. Denvir, 81 Cal. 60, 15 Am. St. Rep. 19; Rankin v. Sisters of Mercy, 82 Cal. 88, and Grant v. Sheerin, 84 Cal. 197."

The Arizona statute in effect at the time this action was commenced, provided for special demurrer (L. 1907, Ch. 74, Sec. 1, Subd. 3), and these decisions of the Supreme Court of California are conclusive.

In the case of Rankin v. Sisters of Mercy, 82 Cal. 88, cited in the foregoing opinion, the court says, at page 90:

> "In support of the appeal it is claimed that the complaint did not state facts sufficient to constitute a cause of action, because there was no averment of non-payment. The averment was, that 'defendant has neglected and refused to pay,' etc. This we think is sufficient. To neglect to do a thing means to omit to do it, not to do it, and the averment was, therefore, equivalent to a statement that defendant had failed and refused to pay."

In the case of Grant v. Sheerin, 84 Cal. 197, the court, also reviewing and interpreting Scroufe v. Clay, relied on by appellees, at page 200, says:

"But there is a plain distinction between an entire failure to state essential facts and a statement of such facts imperfectly or defectively. In the one case the defect can be reached by a general demurrer, while in the other it can only be reached by a special demurrer. The rule upon this subject is thus stated in Harnish v. Bramer, 71 Cal. 158: 'If a complaint fails to state any fact or facts essential to a recovery, the defect may be reached by a general demurrer. If, however, it states all the essential facts, but states them improperly or defectively, the defect can only be reached by a special demurrer, particularly designating the specific point at which it is aimed.' In Scroufe v. Clay, *supra*, there was not an entire failure to state in the complaint the fact of non-payment, but the averment was simply uncertain and defective. And the same is true of this case. But in the former case the demurrer was special, while here it was general. In our opinion in this case the complaint stated a cause of action, and was sufficient when tested only by a general demurrer."

These cases are squarely in point, and it seems to us dispose of the contention of appellees under consideration, as frivolous. The provision in the application and agreement is that the appellees agreed to reimburse appellant. The allegation is that appellant demanded such reimbursement, and the appellees refused. This was a distinct breach of contract. As stated by the Arizona Supreme Court on this question:

> "The breach, therefore, on his part consists in his failure *or refusal* to pay for the work done or agreed to be done."
>
> McPherson v. Hattich, 85 Pac. 732.

Even had there not been an express allegation of a refusal to reimburse, the subsequent allegations heretofore quoted, "that in order to collect the said sums from the said defendants it became necessary for this appellant to employ counsel to bring and institute this action," which allegations are not denied in the answer, are sufficient to constitute an allegation of non-payment good against a general demurrer. Taken as a whole, the complaint clearly states all the essential facts.

V.

The Depositions were Properly Admitted.

The depositions referred to were properly admitted for the reasons given by the court. Even if improperly admitted the error would not have been prejudicial. For, as will be subsequently argued, it was the right and the duty of appellant to have paid the judgment even if the governor of Arizona had taken no steps to compel the appellant to comply with the Arizona law.

VI.

The district court did not err in rendering judgment in favor of the appellant and against the appellees.

The application made by the appellees for the bond, set forth in the complaint, and admitted by the answer, constitutes an express contract of indemnity, and the rule is that if there is such an express contract, a suit for reimbursement may be brought thereon.

22 Am. & Eng. Ency. Law, 484, and cases cited in Note 11;
Powell v. Smith, 8 Johns, 192, at p. 193;
Lane v. Westmoreland, 79 Ala. 372-374.

The action was properly brought upon the express contract of indemnity, notwithstanding a contract would be implied from the mere relation of principal and surety.

The ordinary rule is that a surety may pay the debt at any time he becomes liable therefor. It is unnecessary that suit be brought or judgment rendered or execution issue. It is enough if the surety be subject to be coerced to pay before he discharges the debt.

May v. Ball, 108 Ky. 180; 56 S. W. 7, at p. 9;
Nixon v. Beard, 12 N. E. 131, at p. 132; 111 Ind. 137.
Martin v. Ellerbe, 70 Ala. 326;
Franister v. Withrow, 12 W. Va. 611.

And it is unnecessary that the surety wait longer than the maturity of the debt.

Nixon v. Beard, *supra.*

And some authorities even hold that the surety may pay the debt before the maturity and at the maturity of the obligation may bring a suit for reimbursement against the principal.

Ross v. Menefee, 25 N. E. 545, at p. 546; 125 Ind. 432.

The rendition of judgment against the surety entitles him to pay the judgment without issuance of execution, and entitles the surety to protection even without paying the judgment.

Babbit v. Firm, 101 U. S. 7;

27 Am. & Eng. Ency. Law, 472, and cases cited in Note 16;

Union Trust Co. v. Morrison, 125 U. S. p. 591.

The mere affirmance of a judgment fixes the liability of the principal and sureties on the supersedeas bond, and no execution or other steps are necessary.

Davis v. Patrick, 57 Fed. 909.

Under these authorities it is apparent that when the Supreme Court affirmed the judgment of the District Court appealed from, and entered judgment against the principals and the surety for the amount of the judgment of the court be-

low, the liability of both became fixed, and unless restrained by some statute or rule of court, the execution may issue against both or either, and the plaintiff have collected the amount of the judgment. No further steps were necessary to fix the liability of the surety, and nothing remained for the surety except the mere payment of the judgment. The fact that under the Arizona statutes judgment is rendered against the surety on the supersedeas bond differentiates the case from Davis v. Patrick, *supra*, in that no suit was necessary on the appeal bond, and that the judgment of the Supreme Court was of necessity first executed. The filing of the mandate in the District Court was merely for the official information of that court but it gave no additional rights and created no liabilities. These were fixed by the judgment of the Supreme Court, and the filing of the mandate or the time for the filing was entirely immaterial.

Granting that the liability of the surety may be no greater than that of the principal, from the time of the entry of the judgment of the Supreme Court, or at least of the denial of the motion for rehearing, the liability of both principal and sureties was absolutely fixed, and the plaintiff had the absolute right (passing for the moment the question of the construction of paragraph 1007 of the Revised Statutes of the United States, which will be hereinafter considered) to issue ex-

ecution and collect from either or both, and this right, while perhaps subject to be arrested by the filing of a supersedeas bond, remained in full force until so arrested.

Appellant's right and duty to pay the judgment were not affected by paragraph 1007 of the Revised Statutes of the United States.

By such section one may obtain a supersedeas within sixty days after the rendition of judgment, and cannot obtain a supersedeas after the lapse of sixty days after the rendition of judgment, but this does not mean that a supersedeas exists for such sixty days; on the contrary, the closing sentence of the section expressly provides that "Where a writ of error *may* be a supersedeas" (to-wit, by the giving of security within sixty days after the rendition of such judgment) "execution shall not issue until the expiration of ten days."

In other words, in cases where a party is entitled to a writ of error, and a supersedeas by filing the proper security, the statute gives him without security, or any act whatever, a supersedeas for ten days after the rendition of the judgment. If he is diligent he may within such ten days file his security and obtain his supersedeas. If he is not diligent, after the expiration of such ten days, execution may issue and he may thereafter and during the next fifty days file the bond and arrest the execution if already issued. The

words of the statute, "execution shall not issue until the expiration of ten days," obviously mean ten days after the rendition of the judgment.

This was expressly held by the Supreme Court of the United States, in

Doyle v. Wisconsin, 94 U. S., p. 50.

After the expiration of such fifty days or of the total sixty days after the rendition of the judgment, then he could never under any circumstances obtain his supersedeas.

Section 1007 grants no right to the judgment debtor except a ten days' stay. On the contrary it limits the time within which he may obtain his supersedeas to sixty days after the rendition of the judgment. Therefore, the motion for rehearing having been denied on the 19th of May, on the 29th of May, Randolph might have issued execution against the surety company, appellant and under the authorities heretofore cited it was the duty and the right of the surety company upon demand, to pay the judgment.

Paragraph 410 of the Revised Statutes authorizes the governor to revoke the license of any surety company to transact any new business in this territory whenever it is conducting its business in violation of this act. One of the provisions of this act is that the non-payment of a judgment for more than thirty days after its rendition, shall constitute a forfeiture of all right to do business.

It would be the plain duty of the governor upon ascertaining these facts, to revoke the license of the company.

As a matter of fact the telegram from the governor to the appellant and from the appellant to the governor, were both in evidence in the deposition of Lang, although rejected as a part of the deposition of Cleaveland, and the defendants' objection thereto was overruled.

The fact that under the Arizona statute judgment is rendered against the surety on the supersedeas bond fixes the liability of the surety upon the rendition of the judgment by the Supreme Court. A judgment of the Supreme Court is of necessity self-executing. The Supreme Court of Arizona gives judgment itself. It does not direct the lower court to enter it. The sending of the mandate to the court below is merely the giving of official information to that court of the action of the Supreme Court, but such mandate gives no additional rights and creates no liabilities. These are fixed by the judgment of the Supreme Court, and in this case the filing of the mandate or the date of its filing was entirely immaterial.

As to the purpose of a mandate see:

Rev. Stat. Arizona, paragraphs 1525, 1526 and 1527.

VII.

It is submitted that the District Court made no error, and that the judgment of the Supreme Court should be reversed and the judgment of the District Court affirmed.

EUGENE S. IVES,
Attorney for Appellant.

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Office Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1911.

No. 125.

UNITED STATES FIDELITY & GUARANTY COMPANY, APPELLANT,

vs.

A. SANDOVAL AND P. SANDOVAL.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

BRIEF FOR APPELLEES.

G. BULLARD,
LAWLER, ALLEN, VAN DYKE & JUTTEN,
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Attorneys for Appellees.

FRANK P. FLINT,
HENRY S. VAN DYKE,
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APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

BRIEF FOR APPELLEES.

To the Supreme Court of the United States and to the Honorable Judges thereof:

Appellees, by their attorneys and counsel, hereby respectfully submit the following brief on their behalf:

Statement.

This action was brought for reimbursement to a surety upon an appeal bond made by appellant as surety and appellees as principals upon a covenant in said bond whereby the appellees agree "to reimburse said company (appellant herein) for any and all loss, costs, charges, suits, damages, counsel fees, and expenses of whatever kind or nature, which said company (appellant herein) shall, or may, for any cause, at any time, sustain or incur, or be put to for, or by reason or in consequence of said company (appellant herein) having entered into, or executed said bond" (Tr., p. 3, fol. 5). Appellant secured judgment against appellees in said action on said covenant in the trial court for the sum of $11,484.95, which judgment was modified on appeal by the Supreme Court of the Territory of Arizona and reduced to $544.50, with interest (Tr., p. 96, fol. 197).

On the trial of the case in the district court of Arizona, defendants (appellees herein) established that during the period after the affirmance by the Supreme Court of the Territory of Arizona and before the perfecting of appeal to this court of the case of Randolph *vs.* A. Sandoval and P. Sandoval, now on appeal to this court, the said surety (appellant herein) on said appeal bond entered into an agreement with the said Randolph, by which said surety (appellant herein) did agree to and did pay to said Randolph the sum of $11,484.95, and

said Randolph agreed to and did, as part of said agreement, give to said surety (appellant herein) a bond of indemnity, with collateral security, the condition of which bond was that if the Supreme Court of the United States should reverse the judgment of the Supreme Court of the Territory of Arizona in the above-mentioned action that the said Randolph would pay to the said surety (appellant herein) the sum of $11,484.95, with interest, etc. That said payment to Randolph by the appellant herein was contingent on the giving of the bond and a part of the same transaction, as shown by the following testimony:

> "Mr. MORRISON: Mr. Ives, it is stipulated that the copy that is offered in evidence is an absolute copy of the original bond?
> "Mr. IVES: Yes, sir.
> "Mr. JUTTEN: And moreover, Mr. Ives, as a witness, you testify that that bond was executed by the parties?
> "Mr. IVES: On the date which it bears.
> "Mr. JUTTEN: And by the parties by whom it is apparently executed?
> "Mr. IVES: Yes, sir.
> "Mr. JUTTEN: In connection with this payment?
> "Mr. IVES: As testified to" (Tr., p. 49, fols. 105-6).

This testimony evidently refers to the previous testimony given by Mr. Ives on cross-examination as follows, to-wit:

> "Mr. MORRISON: Q. You said that the bond was executed as a part of the transaction with these people?

"A. Yes, I have the bond in my hand, or a copy of it.

"Q. That is a copy?

"A. Yes, sir, that is a copy" (Tr., p. 47, fol. 100).

In addition to this testimony, it is apparent from the following clause in the bond itself that the payment was conditional upon the execution of the bond and in consideration thereof, to-wit:

> "It is furthermore agreed, that the said Epes Randolph *in further consideration for the payment to him of the said sum of* $11,484.95 *as aforesaid*, and as collateral security for this bond, will deposit, and does herewith deposit, with the said The United States Fidelity & Guaranty Company, obligee, twenty-five thousand shares of the capital stock of Huntington Beach Company, a corporation organized under the laws of the State of California, with the right to the said The United States Fidelity & Guaranty Company, in the event that the said Randolph should fail to pay to the said company the full sum of $11,484.95 with interest as aforesaid, within ninety days after the reversal of the said judgment of the Supreme Court of the Territory of Arizona by the Supreme Court of the United States, to sell the said stock or so much thereof as may be necessary at public or private sale, upon thirty days' notice to the said Randolph; and to apply the proceeds thereof to the payment of the said sum of $11,484.95, with interest; the balance, if any, to be repaid to the said Randolph." (Italics ours.)
>
> (Tr., p. 74, fols. 156-7.)

The said bond also contained the following clause:

> "It is further agreed, that the said Randolph shall have the right to withdraw the said stock deposited herewith as collateral by the substitution therefor either of other collateral satisfactory to James H. Borland, or whoever may be his successor as manager of the United States Fidelity & Guaranty Company, or of a bond with individual sureties similarly satisfactory to the said Borland or his successor."
>
> (Tr., p. 75, fol. 157.)

ARGUMENT.

There is really but one question involved in this appeal. That is, was the said compromise arrangement made between the appellant and Randolph a payment such that, by the laws of suretyship, an action for reimbursement against the principals (the appellees) on the aforesaid appeal bond would lie before the contingency on which said compromise arrangement was conditioned should happen?

There can be no serious dispute as to the principles of suretyship which are decisive of this question. It is fundamental that the right to reimbursement of the surety from the principal is limited to the actual loss to the surety caused by its payment of the debt of the principal which it, the surety, is obliged to pay.

The law is stated in 1 Brandt on Suretyship, Guarantee (3d ed.), section 233, as follows:

> "If the surety extinguishes the debt of the principal for any sum less than the full amount thereof, he can, in the absence of express contract, only recover from the principal the amount paid by him, and interest thereon, and costs. The implied contract is that the surety shall be indemnified only, and he will not be allowed to speculate out of his principal. If he pays in depreciated bank notes, or other money which is below par, but is taken by the creditor at par, he can only recover from the principal the par value of such money. * * * 'He is entitled to recover the amount paid, not the amount extinguished by that payment' (Bonney *vs.* Seely, 2 Wend., 481). * * * If the surety, who compounds a debt for which his principal and himself have become jointly liable, takes an assignment of the debt to a trustee for himself, he can only claim against his principal the amount which he has paid. He occupies in that regard the same position as an agent, and cannot speculate out of his principal."

See also—

Stone *vs.* Hammell, 83 Cal., 547.

Burrus *vs.* Cook (Mo.), 114 S. W., 1065.

12 Current Law, 2017, and cases cited.

The main contention of appellant (appellee in the territorial court) in the trial court was based on an obviously wrong conception of what constitutes a "payment" by the surety.

> "The very term payment, when voluntary and with full knowledge of the facts, excludes the idea of an implied promise to refund."

This was said in the case of Morton *vs.* Chandler, 6 Me., 142, at 144; and *a fortiori* the term "payment," when voluntary and with full knowledge of the facts, excludes the idea of an expressed promise to refund.

No merely possible or contingent loss is sufficient on which to base an action for reimbursement by the surety. At the time of the commencement of this suit appellant had actually lost nothing except his expenses (cf. Tr., p. 96, fol. 197). Under a certain contingency, to-wit, the affirmance by this court of the judgment of the Supreme Court of the Territory of Arizona in the case of Randolph *vs.* A. Sandoval and P. Sandoval, it might sustain an actual loss, but only upon the occurring of that contingency. In other words, appellant as surety on the original appeal bond and Randolph entered into a species of compromise of the judgment rendered against appellees in favor of Randolph.

The Supreme Court of the State of California, in the case of Stone *vs.* Hammell, *supra,* said:

> "If he (the surety) has compromised, he can recover only what the compromise has cost him."

Up to date the compromise agreement between appellant and Randolph has cost the appellant

nothing, and will not cost him anything except in the contingency that this court affirms the judgment in the aforementioned case.

The evidence showing the nature of the transaction, alleged by appellant to have been a payment of $11,484.95, which occurred between Randolph and appellant, is unequivocal and undisputed. It is true that the actual payment of the draft covering said alleged payment was made upon one day and the bond given by Randolph to appellant to secure it against loss in making said alleged payment was signed on a subsequent date, but all of the testimony and the bond itself, taken together, show unquestionably that the said alleged payment and the giving of the said bond was one and the same transaction, and that appellant would not have made such alleged payment except on the consideration of such security. Mr. Ives, attorney for appellant, himself, in his testimony at the trial, states on cross-examination:

> "Q. You said that the bond was executed as a part of the transaction with these people (the appellant corporation)?
>
> "A. Yes, I have the bond in my hand, or a copy of it."
>
> (Tr., p. 47, fol. 100.)

If there could be any possible doubt as to the significance of this admission under oath of appellant's attorney it is removed by the very words of the bond itself, which are:

"It is furthermore agreed that the said Epes Randolph, *in further consideration of the payment to him of said sum of* $11,-484.95 *as aforesaid, and as collateral security for this bond, will deposit, and does herewith deposit, with the said The United States Fidelity and Guaranty Company, obligee, twenty-five thousand shares of the capital stock,*" etc.

Thus this bond itself shows that the alleged payment was made in consideration of the giving of this bond, and that the bond was given in consideration of said payment, and the mere fact that the alleged payment was made on one day and the security given upon another does not make them separate transactions. The practical effect of this alleged payment was not an absolute payment which extinguished the obligation of the judgment recovered by Randolph against appellant and appellees herein; it was rather a loan, an advancement to the said Randolph by appellant of $11,-484.95, for which appellant took a bond and collateral security. And the right of Randolph to retain this loan or advancement as payment would mature only on the affirmance by this court of the decision of the Supreme Court of the Territory of Arizona in the aforesaid case, for should this court reverse that decision it is expressly agreed that said alleged payment would be refunded to the appellant. When Randolph made his demand upon appellant for the payment of said judgment, if it

had paid the money outright so that it had absolutely lost it, it might be conceded, this action could then have been commenced against appellees, but when it and Randolph entered into negotiations by which it did not make an absolute payment to Randolph, but simply advanced the money to him under an arrangement that said loan or advancement should become absolute upon the contingent action of this court in the aforesaid case, the appellant compromised the matter in such a way that it will sustain no actual loss until the action of this court upon said case and provided such action is favorable to said Randolph, and until it has sustained that loss, it is submitted, this action for reimbursement by the surety is premature. It is to be noted here that the Supreme Court of the Territory of Arizona in modifying the judgment of the trial court did it "without prejudice to the rights of the Guaranty Company (appellant herein) to bring such further action as may be necessary to establish its rights, should the right of reimbursement of the amount of the judgment accrue to it" (Tr., p. 96, fols. 197-8). It is, therefore, apparent that the rights of the appellant will not be substantially affected if this court affirm the judgment of the Supreme Court of the Territory of Arizona.

This settlement and compromise made between Randolph and appellant clearly comes within the doctrine that "a surety shall not speculate out of the principal." The very nature of this bond itself is a speculation, the benefit of which they, appel-

lees, under certain circumstances could not avail themselves. This becomes apparent on further inspection of the following clause of this bond (quoted *supra*) to-wit:

> "It is further agreed, that the said Randolph shall have the right to withdraw the said stock deposited herewith as collateral by the substitution therefor either of other collateral satisfactory to James H. Borland, or whoever may be his successor as manager of the United States Fidelity and Guaranty Company, or of a bond with individual sureties similarly satisfactory to the said Borland or his successor."
>
> (Tr., p. 75, fol. 157.)

Now, suppose that these appellees were compelled to pay at this time to appellant this sum of $11,484.95, then under this bond, by a collusion or mutual arrangement between Randolph and appellant, said Randolph could withdraw the presumably good security that he furnished appellant for the fulfillment of said bond and replace it by others which are absolutely worthless, and appellees would be absolutely helpless and unable to defend themselves against this juggling of the security. Surely this constitutes a speculation on the part of appellant as surety out of the principals, the appellees.

It may be urged by appellant that the giving of this bond with collateral security by Randolph was immaterial, because even if it and the security had

not been given by Randolph, still had it been determined eventually that Randolph was not entitled to the $11,484.95, he would be obligated by law to return the money to appellant. This specious argument begs the question at issue, which is, "Was there a payment?" and not the quite different question as to who would at the end of the litigation be legally liable.

In conclusion, we cannot summarize the position of appellees better than by quoting the following from the opinion of the Supreme Court of the Territory of Arizona (cf. Tr., p. 95, fols. 96-7), to-wit:

> "Under the testimony in this case, what loss has the Guaranty Company sustained? The payment made by it to Randolph cannot be said to have been an absolute one, but one conditioned that the judgment be affirmed by the Supreme Court, since it has taken and holds security satisfactory to it for the return of the money with interest, in the event the judgment is reversed. It may not suffer the loss of the amount paid to Randolph. If the judgment in this action is sustained, it will collect the amount from the appellant, and if the Supreme Court of the United States reverses the judgment appealed from, it will also be repaid by Randolph. Such a result would manifestly be inequitable. To sanction it would certainly do violence to 'the cardinal rule that the surety shall not speculate out of the principal.' The Guaranty Company, in taking the security, as pointed out by the authorities to which we have called attention, may be said

to have acted as the agent of the appellants. It took and still holds the security in its own name, and we do not think that it may claim reimbursement from its principals until its actual loss is ascertained, or at least that it may not recover without surrendering the security to its principals."

Appellees therefore respectfully submit the judgment of the Supreme Court of the Territory of Arizona should be affirmed.

Respectfully submitted,

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